

**MEDIA LAW**

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INTRODUCTION

This year’s *Survey* covers a diverse range of cases involving media defendants and the liability and legal challenges they face in the modern media landscape. These cases have important implications to First Amendment rights, the free flow of information, and legal liabilities

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under applicable tort law. These cases include high profile news stories, major and specialized media outlets, and even the President of the United States, which were litigated and appealed in both state and federal courts.

#### I. FIRST AMENDMENT AND PRIOR RESTRAINTS

President Donald Trump's blocking of critics on Twitter violated the First Amendment, a district court ruled in *Knight First Amendment Institute v. Donald J. Trump*.<sup>1</sup> This historic opinion delved into the free speech and First Amendment implications of the modern communications forum, Twitter, and social media in general.<sup>2</sup> Here, the non-profit institute affiliated with Columbia University undertook the action for declaratory relief on behalf of a group of critics who had posted negative comments about Trump on his official Twitter page.<sup>3</sup>

The blocking was an unconstitutional example of "viewpoint discrimination" by the government.<sup>4</sup> The court addressed procedural issues, including standing to sue by the named plaintiffs and the non-profit advocacy group,<sup>5</sup> harm and injury,<sup>6</sup> and redressability.<sup>7</sup> The court also had to address the implications of speech and blocking on the online forum, including the President's First Amendment rights.<sup>8</sup> The court held that the government speech doctrine should apply to presidential tweets because of the way they are used to forward the President's agenda, communicate public policy directives, communicate with legislators and foreign leaders, and criticize his critics and media.<sup>9</sup> Further, the court found the President's Twitter feed to be a designated public forum.<sup>10</sup>

The court found that there was no question that the plaintiffs were blocked by government officials because of their critical political viewpoints.<sup>11</sup> "The continued exclusion of the individual plaintiffs based on [their] viewpoint is, therefore, impermissible under the First Amendment" the court wrote.<sup>12</sup> Later, the court reiterated:

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1. 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018) (citing *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359–60 (2d Cir. 2003)).

2. *Id.* at 550–52.

3. *Id.* at 549, 553–54.

4. *Id.* at 575.

5. *See id.* at 555–56, 562–64.

6. *See Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 556–58.

7. *See id.* at 561–62.

8. *See id.* at 564–67.

9. *Id.* at 571.

10. *Id.* at 575.

11. *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 575.

12. *Id.*

[W]e conclude that the blocking of the individual plaintiffs as a result of the political views they have expressed is impermissible under the First Amendment. While we must recognize, and are sensitive to, the President's personal First Amendment rights, he cannot exercise those rights in a way that infringes the corresponding First Amendment rights of those who have criticized him.<sup>13</sup>

## II. DEFAMATION

This year's *Survey* covers state and federal opinions addressing a wide range of examples exploring whether, under New York tort law, plaintiffs' reputations were harmed by false, published statements.

### A. Elements

A defamation complaint was properly dismissed because the plaintiff failed to establish the prima facie element of falsity and the alleged statement was substantially true, the Second Circuit ruled in *Tannerite Sports, LLC v. NBCUniversal News Group*.<sup>14</sup> The plaintiff had appealed the trial court's dismissal.<sup>15</sup>

The claims arose from a report by investigative reporter Jeff Rossen, which was broadcast on NBC's *Today Show* and on the network's news website.<sup>16</sup> The report described the plaintiff's exploding rifle targets as "bombs," which both the trial and appellate courts held was a reasonable, substantially true description.<sup>17</sup> The plaintiff litigated, arguing that the description was false and defamatory and harmed its reputation as a recreational sports company.<sup>18</sup>

The court reiterated the four elements that the plaintiff must prove: (1) a false statement; (2) published; (3) without privilege; and (4) harm.<sup>19</sup> Of these four prongs, the court focused its decision on the question of falsity and the defense of substantial truth.<sup>20</sup>

"Substantial truth' is the standard by which New York law, and the law of most other jurisdictions, determines an allegedly defamatory

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13. *Id.* at 577.

14. 864 F.3d 236, 239–40, 247 (2d Cir. 2017).

15. *See Tannerite Sports, LLC v. NBCUniversal Media, LLC*, 135 F. Supp. 3d 219, 236 (S.D.N.Y. 2015).

16. *Tannerite Sports, LLC*, 864 F.3d at 240–41.

17. *Id.* at 240, 242, 249 (quoting *Tannerite Sports LLC*, 135 F. Supp. 3d at 235).

18. *Id.* at 241–42.

19. *Id.* at 245 (quoting *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 34, 987 N.Y.S.2d 37, 41–42 (1st Dep't 2014)) (citing *Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1, 5 (1st Dep't 1999)).

20. *Id.* at 242, 248.

statement to be true or false,” the court wrote.<sup>21</sup> The court expanded on this, pointing out that determining truth relates to the effect on the mind of the reader and the relation to truth.<sup>22</sup> The standard does not require complete or one hundred percent truth, thus leaving some reasonable interpretation for what could constitute truth.<sup>23</sup>

But this also relates to how courts would accept falsity, as well, and the underlying effect that falsity has in causing harm to the plaintiff’s reputation because readers or viewers would hold the plaintiff in “public contempt, hatred, ridicule, aversion, or disgrace[s]. . . .”<sup>24</sup>

The court also discussed the pleading requirements for a defamation case applying New York tort law in the federal district court.<sup>25</sup> The state court requirement that the plaintiff sufficiently plead falsity as an element of a defamation claim, as well as showing the specifically offending content, should also be part of the pleading standards in a federal case, the court ruled.<sup>26</sup>

The court wrote: “[b]ecause falsity is an element of New York’s defamation tort, and ‘falsity’ refers to material not substantially true, the complaint in this case must plead facts that, if proven, would establish

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21. *Tannerite Sports, LLC*, 864 F.3d at 242 (citing *Masson v. New Yorker Magazine*, 501 U.S. 496, 516 (1991)).

22. *Id.* at 241–43 (first quoting *Tannerite Sports, L.L.C.*, 135 F. Supp. 3d at 233); and then quoting *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012)) (citing *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1934)).

23. *Id.* at 243 (first quoting *Tolbert v. Smith*, 790 F.3d 427, 440 (2d Cir. 2015); and then quoting *Chau v. Lewis*, 771 F.3d 118, 129–30 (2d Cir. 2014)).

24. *Id.* at 244 (quoting *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 584, 965 N.E.2d 939, 942, 942 N.Y.S.2d 437, 440 (2012)) (first citing *Geraci v. Probst*, 15 N.Y.3d 336, 344, 938 N.E.2d 917, 922, 912 N.Y.S.2d 484, 489 (2010); and then citing *Foster v. Churchill*, 87 N.Y.2d 744, 751, 665 N.E.2d 153, 157 642 N.Y.S.2d 583, 587 (1996)).

25. *See id.* at 251, n.10 (discussing N.Y. C.P.L.R. 3016(a)):

Although federal pleading standards, not state standards govern this matter, the strictness of New York’s law reflects the importance of giving the defendants notice of why any alleged statements were defamatory. Similarly, we note that stricter rules for defamation pleading prevailed under earlier pleading regimes, and although we do not suggest a return to those standards, they underline the importance of receiving proper notice of a defamation claim.

(first citing *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986); and then citing *Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537, 539 (2d Cir. 1951)); *see* N.Y. C.P.L.R. 3016(a) (McKinney Supp. 2019).

26. *Tannerite Sports LLC*, 864 F.3d at 247 (“Having established that falsity — or lack of substantial truth — is an element of a New York defamation claim, it follows that a plaintiff must plead facts demonstrating falsity to prevail on a motion to dismiss the complaint in federal court.”).

that the defendant's statements were not substantially true."<sup>27</sup>

In applying these standards to the *Tannerite* case, the court delved into the meaning of the word "bomb," which was used in the news report to describe the plaintiff's products.<sup>28</sup> To determine the meaning of language and whether the language carries a false or defamatory connotation, the court referred to dictionaries as well as the plaintiff's own promotional literature, which described its exploding targets' dangers.<sup>29</sup>

The court wrote:

To be sure, the items Tannerite lists could be described as "bombs" if, in a perversion of their ordinary uses, someone intended to use them to cause explosions. But Tannerite targets stand out from potatoes, oxygen tanks, and batteries in that the targets' *primary* purpose is explosion. For that reason, the district court correctly ruled that NBC's description of the product as a "bomb" was, at the least, substantially true.<sup>30</sup>

In *Rosenthal v. MDX Medical, Inc.*, a doctor's defamation claim against a website that mistakenly referred to him as dead was properly dismissed because he was unable to prove damages, the appellate division ruled.<sup>31</sup> Additionally, the plaintiff sought damages for prima facie tort, which was also dismissed.<sup>32</sup>

The alleged defamatory material could not fit into any of the categories for libel per se—disparaging a person's profession or trade or imputing a crime.<sup>33</sup> The per se categorization allows a plaintiff to recover damages without additional or specific proof of damages.<sup>34</sup>

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27. *Id.*

28. *Id.* at 248.

29. *Id.* at 248–49 (first citing *United States v. Graziano*, 616 F. Supp. 2d 350, 359–60 (E.D.N.Y. 2008), *aff'd*, 391 F. App'x 965, 969 (2d Cir. 2010); then citing *Bomb*, OXFORD ENGLISH DICTIONARY (2016); and then citing *Bomb*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1981)).

30. *Id.* at 249.

31. 152 A.D.3d 811, 811, 60 N.Y.S.3d 61, 62 (2d Dep't 2017).

32. *Id.*

33. *Id.* at 811–12, 60 N.Y.S.3d at 62 (first quoting *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 379, 366 N.E.2d 1299, 1305, 397 N.Y.S.2d 943, 949 (1977); then quoting *Sydney v. MacFadden Newspaper Publ'g Corp.*, 242 N.Y. 208, 211–12, 151 N.E. 209, 210 (1926); and then quoting *Nichols v. Item Publishers, Inc.*, 309 N.Y. 596, 601, 132 N.E.2d 860, 862 (1956)) (first citing *Golub v. Enquirer/Star Grp.*, 89 N.Y.2d 1074, 1076–77, 681 N.E.2d 1282, 1283, 659 N.Y.S.2d 836, 837 (1997); then citing *Cohen v. N.Y. Times Co.*, 153 A.D. 242, 246, 138 N.Y.S. 206, 210 (2d Dep't 1912); and then citing *Rubenstein v. N.Y. Post Corp.*, 128 Misc. 2d 1, 2–3, 488 N.Y.S.2d 331, 332 (Sup. Ct. N.Y. Cty. 1985)).

34. *Id.* at 811, 60 N.Y.S.3d at 62 (first quoting *Rinaldi, Inc.*, 42 N.Y.2d at 379, 366 N.E.2d at 1305, 397 N.Y.S.2d at 949; then quoting *Sydney*, 242 N.Y. at 211–12, 151 N.E. at 210; and then quoting *Nichols*, 309 N.Y. at 601, 132 N.E.2d at 862).

“Contrary to plaintiff’s contention the defendant’s alleged act of misidentifying him as deceased does not fall within these definitions,” the court wrote.<sup>35</sup> Further, the court held that the website could not be found negligent without proof of direct knowledge or notice.<sup>36</sup>

In *Morelli v. Wey*, a state trial court refused to dismiss numerous claims of defamation against a law firm and its named partners, stating that certain allegations imputing criminal behavior could be susceptible of defamatory meaning.<sup>37</sup> The allegedly defamatory statements, more than 600 in total, were posted on a website, *TheBlot.com*, and throughout social media.<sup>38</sup> Because roughly half of the statements were published after the one-year statute of limitations expired, many counts in the suit were dismissed.<sup>39</sup>

The digital or online nature of the content also required the court to reiterate that continuous online access does not constitute republication or create a new publication for statute of limitations purposes.<sup>40</sup>

The remaining counts, which the court let stand, could raise factual questions that would need further judicial determinations as to their actionability, the court held.<sup>41</sup> For the prima facie elements of the defamation tort, many of the published statements referred to the plaintiff by name, or other “direct references” to the plaintiffs and their law firm.<sup>42</sup>

The allegations of criminal conduct, organized crime ties, membership in the Ku Klux Klan, sexual harassment, bank fraud, and other professional misconduct could constitute defamation per se, meaning the plaintiff will not have to prove special damages.<sup>43</sup> The defendant’s arguments that the statements should be afforded immunity

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35. *Id.* at 811–12, 60 N.Y.S.3d at 62 (first citing *Golub*, 89 N.Y.2d at 1076–77, 681 N.E.2d at 1283, 659 N.Y.S.2d at 837; then citing *Cohen*, 153 A.D. at 246, 138 N.Y.S. at 210; and then citing *Rubenstein*, 128 Misc. 2d at 2–3, 488 N.Y.S.2d at 332).

36. *Rosenthal*, 152 A.D.3d at 812, 60 N.Y.S.3d at 62 (quoting *White v. Guarente*, 43 N.Y.2d 356, 363, 372 N.E.2d 315, 319, 401 N.Y.S.2d 474, 478 (1977)) (citing *Pressler v. Dow Jones & Co.*, 88 A.D.2d 928, 928, 450 N.Y.S.2d 884, 885 (2d Dep’t 1982)).

37. *Morelli v. Wey*, No. 153011/16, 2016 N.Y. Slip Op. 32487(U), at 28 (Sup. Ct. N.Y. Cty. Dec. 16, 2016).

38. *Id.* at 2.

39. *Id.* at 15–16.

40. *Id.* at 15 (citing *Haefner v. N.Y. Media, LLC*, 82 A.D.3d 481, 482, 918 N.Y.S.2d 103, 104 (1st Dep’t 2011)) (“The fact that readers had continuous access to the postings is insufficient to restart the statute of limitations.”).

41. See *Morelli*, 2016 N.Y. Slip Op. 32487(U), at 28–29.

42. *Id.* at 17.

43. *Id.* at 18–20, 24–25 (first citing *Sheridan v. Carter*, 48 A.D.3d 444, 446–47, 851 N.Y.S.2d 252, 252 (2d Dep’t 2008); then citing *Herlihy v. Metro. Museum of Art*, 214 A.D.2d 250, 261, 633 N.Y.S.2d 106, 113 (1st Dep’t 1995); and then citing *Harris v. Queens Cty. Dist. Attorney Office*, No. 08-cv-1703, 2012 U.S. Dist. LEXIS 32886, at \*25–26 (E.D.N.Y. 2012)).

because they were drawn from public records<sup>44</sup> and also constituted pure opinion were unavailing.<sup>45</sup>

Perhaps the court's most striking ruling came in denying the plaintiff's injunction, which demanded the defendant take down or remove the content.<sup>46</sup> The court wrote: "It is well settled that a 'prior restraint on expression comes . . . with a heavy presumption against its constitutional validity.' Prior restraints are not permissible where they are sought merely to enjoin the publication of libel."<sup>47</sup>

### *B. Of and Concerning*

A defamation suit emanating from a feature film's promotional trailer sufficiently identified the plaintiff, the ex-husband of the film's main character, who was described as an adulterer and philanderer, the appellate division ruled in *Cohen v. Broad Green Pictures, LLC*.<sup>48</sup> The feature film, *Learning to Drive*, was based on and adapted from a 2002 magazine article in which the author recounted her experience as a fifty-two-year-old learning to drive in New York City while describing a "lover" through a series of unflattering terms.<sup>49</sup>

As the writer's only ex-husband, the plaintiff was able to establish the content in the trailer was "of and concerning" or about him.<sup>50</sup> "As relates to the story, the plaintiff's salient characteristic is that he is the only ex-husband of the article's author, which distinctive trait links him indelibly to [the character in the film], the only former spouse depicted in the trailer," the court wrote.<sup>51</sup> Because the case was still in the early phases of litigation, the court noted the defendant had not established that

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44. See *id.* at 22, 24–25 (first citing *Sokol v. Leader*, 74 A.D.3d 1180, 1182, 904 N.Y.S.2d 153, 156 (2d Dep't 2010); then citing *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114, 887 N.Y.S.2d 592, 596 (2d Dep't 2009); and then citing N.Y. CIV. RIGHTS LAW § 74 (McKinney 2009)).

45. See *id.* at 27–28 (first citing *Pecile v. Titan Capital Grp., LLC*, 96 A.D.3d 543, 544, 947 N.Y.S.2d 66, 67 (1st Dep't 2012); and then citing *Melius v. Glacken*, 94 A.D.3d 959, 960, 943 N.Y.S.2d 134, 136 (2d Dep't 2012)).

46. See *Morelli*, 2016 N.Y. Slip Op. 32487(U), at 29.

47. *Id.* (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)) (citing *Rosenberg Diamond Dev. Corp. v. Appel*, 290 A.D.2d 239, 239, 735 N.Y.S.2d 528, 529 (1st Dep't 2002)).

48. 160 A.D.3d 569, 570, 75 N.Y.S.3d 37, 38 (1st Dep't 2018) (first citing *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 28 N.Y.3d 82, 86, 65 N.E.3d 35, 37, 42 N.Y.S.3d 64, 66 (2016); and then citing *Geisler v. Petrocelli*, 616 F.2d 636, 639–40 (2d Cir. 1980)).

49. *Id.*

50. *Id.* (first citing *Three Amigos SJL Rest., Inc.*, 28 N.Y.3d at 86, 65 N.E.3d at 37, 42 N.Y.S.3d at 66; and then citing *Geisler*, 616 F.2d at 639–40).

51. *Id.* (citing *Greene v. Paramount Pictures Corp.*, 138 F. Supp. 3d 226, 235 (E.D.N.Y. 2015)).

the plaintiff should be considered either a public figure or involved in a matter of public interest and thus held to the actual malice standard.<sup>52</sup>

### C. Libel Per Se

Falsely imputing HIV or AIDS could qualify as a loathsome disease under the principle of libel per se, the appellate division held in *Nolan v. State of New York*.<sup>53</sup> There, a model had her photograph unwittingly used without her permission or consent in a state public service advertisement advocating for rights for people diagnosed with HIV and AIDS.<sup>54</sup> The plaintiff argued that the misidentification was defamatory and that falsely labeling her as HIV positive constituted imputing that she had a loathsome disease, harming her reputation.<sup>55</sup>

There are four categories of false statements that constitute libel per se, which means damages are implied and do not have to be proven by the plaintiff: (1) falsely accusing the plaintiff of a serious crime; (2) injuring a plaintiff in his or her business, trade, or profession; (3) imputing a loathsome disease; and (4) imputing unchastity to a woman.<sup>56</sup>

The long-standing rationale with these categories is that these areas are so important to a person's reputation, they should be afforded protection under the law because false statements in these areas could "expose a person to hatred, contempt or aversion."<sup>57</sup>

The court held:

Since it can still be said that ostracism is a likely effect of a diagnosis of HIV, we hold that the defamatory material here falls under the traditional "loathsome disease" category and is defamatory per se. Further, to the extent that certain medial conditions such as HIV unfortunately continue to subject those who have them to a degree of societal disapproval and shunning, we decline to entertain the State's

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52. *Id.* at 570–71, 75 N.Y.S.3d at 38 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)).

53. 158 A.D.3d 186, 197, 69 N.Y.S.3d 277, 285 (1st Dep't 2018).

54. *Id.* at 188–89, 69 N.Y.S.3d at 279.

55. *Id.* at 189, 69 N.Y.S.3d at 279–80.

56. *Id.* at 195, 69 N.Y.S.3d at 284 (first citing *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435, 605 N.E.2d 344, 347, 590 N.Y.S.2d 857, 860 (1992); and then citing *Harris v. Hirsh*, 228 A.D.2d 206, 208, 643 N.Y.S.2d 556, 559 (1st Dep't 1996)).

57. *Id.* at 195–96, 69 N.Y.S.3d at 284 (quoting *Mencher v. Chesley*, 297 N.Y. 94, 100, 75 N.E.2d 257, 259 (1947)). The Court acknowledged imputing homosexuality was once an unofficial fifth category. *Id.* at 196, 69 N.Y.S.3d at 284 (first citing *Nacinovich v. Tullet & Tokyo Forex*, 257 A.D.2d 523, 524, 685 N.Y.S.2d 17, 19 (1st Dep't 1999); then citing *Klepetchko v. Reisman*, 41 A.D.3d 551, 552, 839 N.Y.S.2d 101, 102–03 (2d Dep't 2007); then citing *Tourge v. City of Albany*, 285 A.D.2d 785, 786, 727 N.Y.S.2d 753, 755 (3d Dep't 2001); and then citing *Privitera v. Phelps*, 79 A.D.2d 1, 3, 435 N.Y.S.2d 402, 404 (4th Dep't 1981)).



argument that the entire “loathsome disease” category is archaic and has no place in our jurisprudence.<sup>58</sup>

In *Caixin Media Co. v. Guo Wengui*, allegations that the founder and editor of a foreign media group had an extra-marital affair, gave birth to an illegitimate child, used illegal drugs, and sent her partner to the hospital, could be susceptible of defamatory meaning, a trial court held.<sup>59</sup> The substantive legal decision determined that the statements published on various social media platforms were provable factual statements, not opinion, and could constitute libel per se.<sup>60</sup> “These statements have precise and readily understood meaning, capable of being proven true or false, and signal readers on social media platforms that what is being read is likely to be fact,” the court wrote.<sup>61</sup>

Because the categories under libel per se are critical to a plaintiff’s reputation, such as statements injuring a person’s reputation in business or trade, or imputing unchastity of a woman, the tort does not require proof of general damages.<sup>62</sup> This analysis also followed a brief discussion of opinion.<sup>63</sup>

The court also ruled that the statements could be susceptible of damages under the intentional infliction of emotional distress tort.<sup>64</sup>

Additionally, before delving into the substantive issues, the court had to determine whether the plaintiff’s business organization was capable of being recognized in the jurisdiction as a foreign business.<sup>65</sup> The defendant sought dismissal based on standing under Civil Practice Laws and Rules (CPLR) 3211(a)(3) and Business Corporation Law § 1312(a).<sup>66</sup> The defendant argued that the plaintiff was not a registered corporation in New York, failed to pay taxes or registration fees within

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58. *Nolan*, 158 A.D.3d at 197, 69 N.Y.S.3d at 285.

59. No. 652154/2017, 2018 N.Y. Slip Op. 30349(U), at 1–2, 5 (Sup. Ct. N.Y. Cty. Jan. 11, 2018).

60. *Id.* at 5.

61. *Id.*

62. *Id.* at 5–6 (citing *Matherson v. Marchello*, 100 A.D.2d 233, 236, 473 N.Y.S.2d 998, 1001 (2d Dep’t 1984)).

63. See *Caixin Medica Co.*, 2018 N.Y. Slip Op. 30349(U), at 5 (citing *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813, 817 (1993)) (discussing that to determine whether a statement is protected as pure opinion, the court must weigh: 1) whether the language used has a precise meaning; 2) whether the plaintiff can prove the truth or falsity of the statement; and 3) the full context of the statement which might inform the reader that the statement is opinion or factual).

64. *Id.* at 7.

65. *Id.* at 3 (first citing N.Y. BUS. CORP. LAW § 1312(a) (McKinney 2003); and then citing *Cadle Co. v. Hoffman*, 237 A.D.2d 555, 555, 655 N.Y.S.2d 633, 634 (2d Dep’t 1997)).

66. *Id.* at 2–3 (first citing N.Y. C.P.L.R. § 3211(a)(3) (McKinney 2016); and then citing BUS. CORP. § 1312(a)).

the jurisdiction, and should not be afforded venue, which the court said could be cured by paying fees and obtaining appropriate certifications within sixty days.<sup>67</sup>

Though the plaintiff will be held to the actual malice standard, as a corporation, the court also dismissed a claim for trade libel.<sup>68</sup>

#### *D. Public Figure/Private Figure/Actual Malice*

A high-ranking Venezuelan government official accused of drug dealing and money laundering in a newspaper story could not establish actual malice, the Second Circuit ruled in *Cabello-Rondon v. Dow Jones & Co.*<sup>69</sup> The trial court properly dismissed the plaintiff's second amended complaint.<sup>70</sup>

Though the trial court questioned whether the plaintiff had sufficiently pleaded falsity in his complaint, it was firm in ruling that the plaintiff had not established the newspaper published the allegations with actual malice.<sup>71</sup>

The court explained the complex meaning of the actual malice privilege, quoting precedent to define the term as publication with knowledge of falsity or reckless disregard for the truth, meaning the publisher "entertained serious doubts as to the truth of his publication."<sup>72</sup> This heightened standard is required for public figures, which would certainly include the plaintiff here, the vice president of a foreign country.<sup>73</sup>

The plaintiff argued that the newspaper fabricated information, used confidential sources, and based its reporting on leaked documents, which amounted to actual malice.<sup>74</sup> Relying on a statement from *Biro v. Conde Nast*, the plaintiff argued that a reporter's use of and reliance on confidential or anonymous sources "may support an inference of actual malice."<sup>75</sup> The court rejected the arguments, calling them "patently

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67. *Id.* at 3–4 (citing BUS. CORP. § 1312(a)).

68. *Caixin Media Co.*, s2018 N.Y. Slip Op. 30349(U), at 5–6 (citing N.Y. C.P.L.R. § 3211(a)(7)).

69. 720 F. App'x. 87, 88 (2d Cir. 2018). For a more complete factual account of the underlying allegations, see *Cabello-Rondón v. Dow Jones & Co.*, No. 16-cv-3346 (KBF), 2017 U.S. Dist. LEXIS 131114, at \*1–3 (S.D.N.Y. 2017).

70. *Cabello-Rondón*, 720 F. App'x at 88.

71. *See id.*

72. *Id.* (quoting *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001)).

73. *Id.* (quoting *Biro v. Condé Nast*, 807 F.3d 541, 546 (2d Cir. 2015)).

74. *Id.*

75. *Cabello-Rondón*, 720 F. App'x at 89 (quoting *Biro*, 807 F.3d at 546).

unbelievable.”<sup>76</sup>

In *Palin v. New York Times Co.*, a federal court not only recited important elements of defamation and the actual malice privilege, but also made a bold statement about First Amendment principles in relation to news coverage of public figures and public issues.<sup>77</sup> The court dismissed a libel claim against the newspaper by Sarah Palin, former vice presidential candidate and noted public figure, who sued for defamation after the newspaper published a critical editorial that contained erroneous information.<sup>78</sup> The newspaper later corrected the errors.<sup>79</sup>

The editorial opined on a recent mass shooting and erroneously connected a Palin-associated website to a 2011 Arizona mass shooting.<sup>80</sup> Because the editorial was published without a byline and multiple *New York Times* editorial writers contributed to the piece, the judge held an evidentiary hearing, which was somewhat unusual in a defamation case.<sup>81</sup> The court noted the hearing was intended to determine whether the writer had the requisite knowledge to establish the plausibility that the editorial was published with actual malice—known falsity or with reckless disregard for the truth, under the landmark *New York Times v. Sullivan*.<sup>82</sup>

First, the court laid out the five elements of a libel claim under New York law: (1) a written defamatory statement of fact about the plaintiff; (2) published to a third party; (3) with fault—either negligence for private figures or actual malice with public figures or public officials; (4) falsity; and (5) special damages or per se actionability.<sup>83</sup>

Even though the offending statements were contained in an editorial,

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76. *Id.*

77. *See* 264 F. Supp. 3d 527, 529 (S.D.N.Y. 2017). In its opening, the court’s opinion states:

Nowhere is political journalism so free, so robust, or perhaps so rowdy as in the United States. In the exercise of that freedom, mistakes will be made, some of which will be hurtful to others . . . [b]ut if political journalism is to achieve its constitutionally endorsed role of challenging the powerful, legal redress by a public figure must be limited to those cases where the public figure has a plausible factual basis for complaining that the mistake was made maliciously, that is, with knowledge it was false or with reckless disregard of its falsity.

*Id.*

78. *Id.* (granting the newspaper’s motion to dismiss).

79. *Id.* at 532.

80. *Id.* at 531.

81. *Id.* at 530 n.1.

82. *See Palin*, 264 F. Supp. 3d at 530–33; *see also* *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

83. *Id.* at 533 (quoting *Celle v. Filipino Rep. Enters. Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)).

an opinion piece, the court wrote that it was “relevant, but hardly dispositive.”<sup>84</sup> In applying the elements, the court found that the statements were about the plaintiff and contained some elements of both truth and falsity even though it was clearly a newspaper’s opinion editorial.<sup>85</sup> A “reasonable reader” could infer that the newspaper knew special facts or evidence related to the allegations in the editorial that could be factual.<sup>86</sup>

The court’s strongest and most forceful analysis came in its discussion of actual malice, which it called a “protective overlay” to ensure wide open debate on public issues and criticism of public figures.<sup>87</sup> Even after the hearing, the plaintiff could not establish that the newspaper acted with actual malice because there were multiple writers on the editorial, and the senior writer with the most influence on the piece testified that he wrote the editorial quickly on deadline and conducted research while the newspaper quickly corrected the errors with a posting both online and in the print edition the next day.<sup>88</sup>

Pure criticism within an editorial or opinion piece is not proof of actual malice.<sup>89</sup>

In its conclusion, the court wrote:

We come back to the basics. What we have here is an editorial, written and rewritten rapidly in order to voice an opinion on an immediate event of importance in which are included a few factual inaccuracies somewhat pertaining to Mrs. Palin that are very rapidly corrected. Negligence this may be; but defamation of a public figure it plainly is not.<sup>90</sup>

#### *E. Gross Irresponsibility*

A television news report and online news story that misstated elements of a police report and police press release was defamatory and not privileged under the fair and accurate privilege, a state court held.<sup>91</sup> The plaintiff had been arrested with a man who was accused of operating

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84. *Id.* at 535 (citing *Brian v. Richardson*, 87 N.Y.2d 46, 52, 660 N.E.2d 1126, 1130, 637 N.Y.S.2d 347, 351 (1995)).

85. *Id.* at 535–36.

86. *Id.* at 535.

87. *Palin*, 264 F. Supp. 3d at 536–37 (quoting *Sullivan*, 376 U.S. at 270).

88. *Id.* at 537.

89. *Id.* (citing *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657, 665 (1989)).

90. *Id.* at 540.

91. *Pirrone v. News 12 Interactive, LLC*, No. 711977/2016, N.Y. Slip Op. 32207(U), at 4–5 (Sup. Ct. Queens Cty. Oct. 3, 2017) (citing N.Y. CIV. RIGHTS LAW § 74 (Consol. 2001)).

a marijuana growing operation in Queens.<sup>92</sup> The man had been charged with several offenses related to the drug operation while the plaintiff was charged only with obstructing governmental operations and hindering prosecution.<sup>93</sup>

Language in the news reports explicitly identified the plaintiff as a participant in the criminal operation, identifying her as part of a “Queens couple” that was “accused of running a massive marijuana grown house.”<sup>94</sup> The report also included details, culled from police reports, including police collection of a large amount of marijuana, cocaine, over \$40,000 in cash, and guns.<sup>95</sup>

The defendant vested its motion to dismiss on the fair and accurate privilege because the reporting was based on the police report and police department’s press release.<sup>96</sup> Basing news reports on public records or official government proceedings offers an absolute defense to libel claims under Civil Rights Law § 74.<sup>97</sup> Although courts will allow some degree of liberality to the use of such documents, meaning the reports do not have to be verbatim or the “exact” wording of every proceeding, the reports must still be fair, true, and accurate.<sup>98</sup>

Because the plaintiff successfully established eight false factual misstatements in the news report, the privilege was denied.<sup>99</sup> “The reports omitted certain crucial information, including the obvious fact that the plaintiff was only charged with obstructing governmental administration and hindering prosecution, thus they are not truthful,” the court wrote.<sup>100</sup>

The reporter’s errors here constituted “gross[] irresponsi[bility]” by failing to employ responsible journalistic standards.<sup>101</sup> Further, the court wrote: “[T]hey should have exercised some sort of quality control to substantiate the statements contained in the article before it was published

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92. *Id.* at 2.

93. *Id.* at 4.

94. *Id.* at 2.

95. *Id.*

96. *Pirrone*, 2017 N.Y. Slip Op. 32207(U) (citing CIV. RIGHTS § 74).

97. *Id.* at 3 (first quoting CIV. RIGHTS § 74; and the quoting *Glendora v. Gannett Suburban Newspapers*, 201 A.D.2d 620, 620, 608 N.Y.S.2d 239, 241 (2d Dep’t 1994)) (first citing *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114, 887 N.Y.S.2d 592, 595 (2d Dep’t 2009); and then citing *Pelayo v. Celle*, 270 A.D.2d 469, 469–70, 705 N.Y.S.2d 282, 283 (2d Dep’t 2000)).

98. *Id.* at 3–4 (quoting *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 260 N.Y. 106, 118, 183 N.E. 193, 197 (1932)) (citing *Holy Spirit Ass’n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67, 399 N.E.2d 1185, 1187, 424 N.Y.S.2d 165, 167 (1979)).

99. *Id.* at 4–5.

100. *Id.* at 4.

101. *Pirrone*, 2017 N.Y. Slip Op. 32207(U), at 4–5.

and disseminated to the public at large.”<sup>102</sup>

#### *F. Opinion*

Though *Zervos v. Trump* does not involve media parties, the defamation case against the sitting president could go forward, a trial court decided.<sup>103</sup> The facts of this case, which generated widespread media attention, involved Donald Trump’s vociferous rebuke of a former *Apprentice* contestant who claimed Trump acted inappropriately toward her in 2007.<sup>104</sup> Trump essentially called the plaintiff a liar, prompting the defamation suit.<sup>105</sup>

The court addressed the question of litigation against a sitting president, which the court held could proceed because the underlying dispute and potentially defamatory statements occurred before Trump was elected and did not implicate his duties as president.<sup>106</sup>

The next question was whether the statements could be defamatory or protected pure opinion.<sup>107</sup> The court wrote: “A reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe what defendant’s statements convey: that plaintiff is contemptible because she ‘fabricated’ events for personal gain.”<sup>108</sup>

Applying *Davis v. Boenheim*, the court noted: (1) Trump’s statements could be proven true or false; (2) the statements were relevant to determine whether plaintiff fabricated statements to further her own agenda; (3) the statement’s context—speeches, statements and Tweets; and (4) whether the statements could be considered pure opinion, “heated rhetoric or hyperbole.”<sup>109</sup>

#### *G. Truth*

Truth is an absolute defense in a defamation case, a federal court reiterated in a case involving a media executive’s employment litigation.<sup>110</sup> This case involved a cause of action for libel, though the

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102. *Id.*

103. 59 Misc. 3d 790, 797, 74 N.Y.S.3d 442, 447–48 (Sup. Ct. N.Y. Cty. 2018), *lv. denied*, 31 N.Y.3d 1113, 1114 (2018).

104. *Id.* at 791–93, 74 N.Y.S.3d at 444–45.

105. *Id.* at 794–95, 74 N.Y.S.3d at 446.

106. *Id.* at 797, 74 N.Y.S.3d at 447–48.

107. *See id.* at 798–99, 74 N.Y.S.3d at 448–49.

108. *Zervos*, 59 Misc. 3d at 799, 74 N.Y.S.3d at 449 (citing *Divet v. Reinisch*, 169 A.D.2d 416, 417, 564 N.Y.S.2d 142, 143 (1st Dep’t 1991)).

109. *Id.*; *see also Davis v. Boenheim*, 24 N.Y.3d 262, 270–71, 22 N.E.3d 999, 1005–06, 998 N.Y.S.2d 131, 137–38 (2014).

110. *Cortes v. Twenty-First Century Fox Am., Inc.*, 285 F. Supp. 3d 629, 633, 642

court found much of the plaintiff's arguments unavailing and questioned the validity of his conspiracy theory.<sup>111</sup>

Many facts and allegations leveled against the plaintiff in the underlying employment and sexual harassment dispute were "uncontested as true."<sup>112</sup> Even in his defamation cause of action, they were properly dismissed, the court held.<sup>113</sup> A "joint statement" issued by the employer/defendant, which was also part of a *New York Times* story on sexual harassment in the media, was not defamatory.<sup>114</sup> "Given that the Joint Statement either is not or cannot be 'proven false,' it cannot be claimed as defamatory," the court wrote.<sup>115</sup>

#### *H. Fair and Accurate Report*

Tabloid newspaper coverage of a high-profile "bizarre" divorce was protected as a fair and accurate report, as well as privileged under Civil Rights Law § 74, a federal court ruled in two separate but related libel cases.<sup>116</sup> Though the two "*Zappin*" defamation cases emanated from the same divorce proceedings and controversies and had minor differences, both decisions found the news accounts were substantially truthful reports of judicial proceedings.<sup>117</sup> The news accounts of the bitter divorce proceedings recounted, among other things, allegations of abuse, vandalism, misconduct, a physical altercation in the courtroom, and a range of sanctions leveled against the plaintiff.<sup>118</sup>

Section 74 bars defamation claims that are based on governmental proceedings or public records: "a civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding or for any heading of the report which is a fair and

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(S.D.N.Y. 2018) (quoting *Giuffre v. Maxwell*, No. 15 Civ. 7433, 2017 U.S. Dist. LEXIS 64405, at \*11–12 (S.D.N.Y. Apr. 27, 2017)).

111. *Id.* at 633, 636.

112. *Id.* at 642.

113. *Id.*

114. *Id.* at 642.

115. *Cortes*, 285 F. Supp. 3d at 642 (quoting *Small Bus. Bodyguard Inc. v. House of Moxie, Inc.* 230 F. Supp. 3d 290, 312 (S.D.N.Y. 2017)).

116. *See Zappin v. Daily News, L.P.*, No. Civ. 8762 (KPF), 2017 U.S. Dist. LEXIS 125959, at \*2, \*37–38 (S.D. N.Y. Aug. 9, 2017) (first citing N.Y. CIV. RIGHTS LAW § 74 (Consol. 2001); and then citing *ABKCO Music v. Sagan*, No. 15 Civ. 4025 (ER), 2016 U.S. Dist. LEXIS 60778, at \*22 (S.D.N.Y. May 6, 2016)); *see also Zappin v. NYP Holdings, Inc.*, No. 16 Civ. 8838 (KPF), 2018 U.S. Dist. LEXIS 49479, at \*1, \*18 (S.D.N.Y. Mar. 26, 2018).

117. *Id.* at \*1–2; *Zappin*, 2017 U.S. Dist. LEXIS 125959, at \*37–38 (first citing CIV. RIGHTS § 74; and then citing *ABKCO Music*, 2016 U.S. Dist. LEXIS 60778, at \*22).

118. *Id.* at \*10; *Zappin*, 2017 U.S. Dist. LEXIS 125959, at \*24–25.

true headnote of the statement published.”<sup>119</sup>

The critical question under review in the two cases was whether § 74 protections applied to matrimonial proceedings.<sup>120</sup> A 1970 Court of Appeals decision, *Shiles v. News Syndicate Co.*, raised questions about the applicability of the privilege in divorce proceedings.<sup>121</sup> New York’s Domestic Relations Law also raised questions about the applicability of the privilege.<sup>122</sup>

Both *Zappin* decisions held that news accounts, drawn from public judicial proceedings and associated court records, should be protected under the statute.<sup>123</sup> Even minor inaccuracies did not remove the privilege.<sup>124</sup>

The principal rationale from the first case, quoted in the second case stated:

It is clear despite the *Shiles* Court’s occasional reference to the inapplicability of § 74 to the “publication of a report of matrimonial proceedings,” a more nuanced inspection of the decision’s facts, analysis, and foundational authority confirms that *Shiles* does not render the § 74 privilege categorically inapplicable to public judicial proceedings in a matrimonial action.<sup>125</sup>

The “dossier” at the center of a controversial *Buzzfeed* article qualified as a legitimate record for a § 74 defense in a defamation case by Russian businessmen, a state trial court held in *Fridman v. Buzzfeed, Inc.*<sup>126</sup> The dossier, part of a briefing given to President Obama, was to the FBI, and named the plaintiffs in its discussion of unverified statements about then-president-elect Donald Trump.<sup>127</sup> The plaintiffs were named in the document and sued *Buzzfeed* for defamation and then

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119. CIV. RIGHTS § 74.

120. *Zappin*, 2018 U.S. Dist. LEXIS 49479, at \*15 (citing CIV. RIGHTS § 74); *Zappin*, 2017 U.S. Dist. LEXIS 125959, at \*18.

121. 27 N.Y.2d 9, 12, 261 N.E.2d 251, 252, 313 N.Y.S.2d 104, 105 (1970) (citing CIV. RIGHTS § 74).

122. See N.Y. DOM. REL. LAW § 235(2) (McKinney 2010).

123. 2018 U.S. Dist. LEXIS 49479, at \*17–18 (quoting 2017 U.S. Dist. LEXIS 125959, at \*23). “In short, this Court has no doubt that the § 74 privilege is available to Defendant for its report of the public November 10 hearing.” *Id.* at \*18 (citing CIV. RIGHTS § 74).

124. *Id.* at \*21–22; 2017 U.S. Dist. LEXIS 125959, at \*33 (“Whether the inaccuracy in the Article’s statement was to attribute the wrong verb to the right speaker or the right verb to the wrong speaker, the effect on the audience is the same as the ‘precise truth.’”).

125. *Zappin*, 2017 U.S. Dist. LEXIS 125959, at \*22 (quoting *Shiles*, 27 N.Y.2d at 15) (citing CIV. RIGHTS § 74).

126. No. 154895/2017, 2018 N.Y., Slip Op. 30834(U), at 1–2, 4 (Sup. Ct. N.Y. Cty. May 4, 2018).

127. *Id.* at 1.



filed a motion to have the defendant's affirmative defenses dismissed.<sup>128</sup>

While the court rejected defenses based on neutral reportage because the doctrine is not recognized by New York courts,<sup>129</sup> and a general First Amendment defense,<sup>130</sup> it accepted the fair report privilege.<sup>131</sup> Again, the journalistic use of government documents and public records is related to matters of public interest.<sup>132</sup>

The court wrote:

The fact is that the Dossier itself, according to BuzzFeed, was part of the government's investigation. Under plaintiff's theory, BuzzFeed could only publish the Dossier if it knew that every single statement in it was part of the alleged government investigation. That is not a logical reading of the fair report privilege.<sup>133</sup>

The court reiterated that the privilege under § 74 should be liberally applied and interpreted.<sup>134</sup> This means that the document would not necessarily need to be the product of a government investigation.<sup>135</sup>

### *I. Choice of Law*

Litigating a defamation case in New York and applying the State's substantive law is proper when the media defendant is headquartered in the State, the district court wrote in *Cabello-Rondón v. Dow Jones & Co.*<sup>136</sup> The court noted that the parties had not made arguments on jurisdiction or choice of law issues.<sup>137</sup>

The court noted the difficulty of litigating libel cases because media is now a global issue and publications transcend not only state but international borders.<sup>138</sup> Determining the locus of where the harm occurs

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128. *Id.* at 1–2. The plaintiffs filed a motion under N.Y. C.P.L.R. 3211(b) (N.Y. C.P.L.R. § 3211(b) (2016)).

129. *Id.* at 4–5 (citing *Hogan v. Herald Co.*, 84 A.D.2d 470, 479, 446 N.Y.S.2d 836, 842 (4th Dep't 1982)).

130. *Id.* at 5.

131. *Fridman*, 2018 N.Y. Slip Op. 30834(U) at 4.

132. *See id.* at 3.

133. *Id.* at 4.

134. *Id.* at 3 (quoting *Cholowsky v. Civiletti*, 69 A.D.3d 110, 114, 887 N.Y.S.2d 592, 595 (2d Dep't 2009)); *see also* N.Y. CIV. RIGHTS LAW § 74 (Consol. 2001).

135. *Id.* at 3.

136. No. 16-cv-3346 (KNF), 2017 U.S. Dist. LEXIS 131114, at \*8–9 (S.D. N.Y. Aug. 16, 2017). The Second Circuit opinion, discussed above, did not rule on the jurisdictional issues in affirming the dismissal. *See generally* *Cabello-Rondón v. Dow Jones & Co.*, 720 F. App'x 87 (2d Cir. 2018) (affirming without discussing any jurisdictional issues).

137. *Id.* at \*7.

138. *See id.* at \*8 (quoting *Condit v. Dunne*, 317 F. Supp. 2d 344, 353 (S.D.N.Y. 2004)).

could raise civil procedural concerns for litigants.<sup>139</sup> This issue could be a concern for a plaintiff, such as Cabello-Rondon, who was a resident of Venezuela.<sup>140</sup> The defendant, here, Dow Jones, is a media company with international reach, but is domiciled in New York.<sup>141</sup>

The court wrote:

In light of Dow Jones's status as a New York domiciliary, New York's interest in regulating the conduct of its media, the claim that the purportedly defamatory statements allegedly emanated from New York, the diffuse effects of the harm Dow Jones conduct allegedly caused and lack of any allegations as to Venezuela's interest in policing defamation claims, the Court finds that New York law applies to this dispute.<sup>142</sup>

#### *J. Procedural—Evidence*

In *Greenberg v. Spitzer*, the appellate division made a fact-sensitive determination that some comments made on television and in a book could constitute a factual statement of fact susceptible of defamatory meaning.<sup>143</sup> The defamation suit by a former insurance company CEO followed a long-simmering clash with the former New York Attorney General who appeared on two cable television shows and wrote a book referencing state and federal investigations that touched the plaintiff and his employer, AIG.<sup>144</sup> The overall tenor of defendant Eliot Spitzer's comments alleged that the plaintiff engaged in a wide range of fraudulent and criminal actions before he was fired by the company's board of directors.<sup>145</sup>

The complaint and the defendant's motion to dismiss based on CPLR 3211(a)(1) and (7) required the court to divide and categorize nearly a dozen potentially defamatory comments Spitzer made in two televised cable television interviews and in a section of his book, *Protecting Capitalism*, and then determine whether they could be considered factual statements or pure opinion, or were privileged as fair and true reports under § 74.<sup>146</sup> The court also had to look at the comments

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139. *Id.*

140. *Id.* at \*8–9.

141. *Cabello-Rondón*, 2017 U.S. Dist. LEXIS 131114, at \*9.

142. *Id.*

143. 155 A.D.3d 27, 47, 62 N.Y.S.3d 372, 388 (2d Dep't 2017) (citing *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813, 817 (1993)).

144. *Id.* at 33–34, 62 N.Y.S.3d at 378–79.

145. *See id.* at 34–40, 62 N.Y.S.3d at 379–83.

146. *Id.* (citing N.Y. C.P.L.R. 3211(a)(1) (McKinney 2016)); *see* N.Y. CIV. RIGHTS LAW § 74 (Consol. 2001).

through the actual malice lens.<sup>147</sup>

Because of the complexity and detail of the examples here and the partial grant and partial denial of dismissal, it is difficult to ascertain a clear, applicable ruling on substantive legal issues from the court.<sup>148</sup> Of particular applicability, perhaps, could be the defendant's inclusion of interview transcripts as documentary evidence in his motion to dismiss.<sup>149</sup>

The court had to consider the weight given to documentary evidence—transcripts, DVDs and the defendant's book—for a pre-trial motion to dismiss under CPLR 3211(a)(1), which affords dismissal based on documentary evidence.<sup>150</sup> In this case, the production of the documentary evidence was intended to establish that many of the statements were drawn from privileged public records, either factually true or constituted protected opinion.<sup>151</sup>

These materials should be considered as a matter of law to determine whether the published and broadcast statements could be potentially defamatory.<sup>152</sup>

The court wrote: “Here again, the documentary evidence is not offered for the truth of its contents, but merely as proof of the underlying proceeding giving rise to the privilege, for the specific purpose of determining whether the alleged defamatory statement constitutes a ‘fair and true’ report of such proceeding.”<sup>153</sup>

Thus, the appellate division modified part of the lower court dismissal.<sup>154</sup>

A defamation claim by a foreign news outlet accused of fabricating fake news stories generated a complicated dispute over discovery after the plaintiff destroyed or lost some critical evidence in *Ledig v.*

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147. *Id.* at 41, 62 N.Y.S.3d at 383 (citing *Mahoney v. Adirondack Publ'g. Co.*, 71 N.Y.2d 31, 39, 517 N.E.2d 1365, 1369, 523 N.Y.S.2d 480, 483 (1987)).

148. *See Greenberg*, 155 A.D.3d at 56, 62 N.Y.S.3d at 394 (citing N.Y. C.P.L.R. 3211(a)).

149. *Id.* at 45, 62 N.Y.S.3d at 386 (first citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 254, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917 (1991); and then citing *Siltsdorf v. Levine*, 59 N.Y.2d 8, 13, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825 (1983)).

150. *See id.*

151. *Id.* at 45–46, 62 N.Y.S.3d at 386–87 (first citing *Fontanetta v. John Doe I*, 73 A.D.3d 78, 84–85, 898 N.Y.S.2d 569, 574 (2d Dep't 2010); and then citing *Goshen v. Mutual Life Ins. Co.*, 98 N.Y.2d 314, 326, 774 N.E.2d 1190, 1197, 746 N.Y.S.2d 858, 865 (2002)).

152. *Id.* at 45, 62 N.Y.S.3d at 386 (citing *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 254, 567 N.E.2d 1270, 1281, 566 N.Y.S.2d 906, 917 (1991); and then citing *Siltsdorf v. Levine*, 59 N.Y.2d 8, 12–13, 449 N.E.2d 716, 719, 462 N.Y.S.2d 822, 825 (1983)).

153. *Greenberg*, 155 A.D.3d at 45, 62 N.Y.S.3d at 386 (quoting N.Y. CIV. RIGHTS LAW § 74 (Consol. 2001)).

154. *Id.* at 56, 62 N.Y.S.3d at 394.

*Buzzfeed*.<sup>155</sup> The *Buzzfeed* article, under the headline, “The King of Bullsh\*t,” raised questions about the plaintiff’s outrageous news stories including lonely people in China walking pet cabbages, Russian women who lost their jobs after stripping in public, and a two-headed goat in China.<sup>156</sup>

During the discovery phase, the plaintiff was unable to, or refused to, turn over certain evidence critical to the case, including the underlying articles which were published and then lost on its Austrian and Croatian websites, metadata relating to the stories, emails, screenshots, and other data.<sup>157</sup> There were also questions about whether a witness produced for a deposition was adequately prepared to testify.<sup>158</sup>

*Buzzfeed* argued that the evidence was critical to its defense, particularly in helping it raise the question of whether the plaintiff could establish that it should be considered a private, public, or limited purpose public figure for the litigation.<sup>159</sup> The plaintiff’s status would be critical to which legal standard should be applied, and thus, whether the plaintiff would have to prove that *Buzzfeed* published the articles with actual malice—known falsity or reckless disregard for the truth under *Gertz v. Robert Welch, Inc.*<sup>160</sup>

*Buzzfeed* argued under Federal Rule of Civil Procedure 37(e) that the plaintiff engaged in spoliation of evidence and should be sanctioned because destruction of or failure to preserve certain critical evidence would prejudice its defense.<sup>161</sup> The court wrote that the plaintiff should have been aware that its “websites were relevant to his defamation lawsuit in some fashion.”<sup>162</sup>

Thus, the court held that the plaintiff could not use its metadata in its case, and *Buzzfeed* would be able to present evidence that the plaintiff disabled its website as well as other evidence from the website archives.<sup>163</sup>

In *Baines v. Daily News L.P.*, a trial court allowed a defamation

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155. See No. 16 Civ. 542 (VM) (GWG), 2017 U.S. Dist. LEXIS 208756, at \*1–9 (S.D.N.Y. Dec. 19, 2017).

156. *Id.* at \*1–2.

157. *Id.* at \*4–6, \*8.

158. See *id.* at \*15–20.

159. *Id.* at \*27 (quoting *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136–37 (2d Cir. 1984)).

160. *Leidig*, 2017 U.S. Dist. LEXIS 208756, at \*26–27 (quoting 418 U.S. 323, 342 (1974)).

161. *Id.* at \*21–22; FED. R. CIV. P. 37(e).

162. *Leidig*, 2017 U.S. Dist. LEXIS 208756, at \*28.

163. *Id.* at \*41–42.

plaintiff, who was a convicted violent rapist and pimp, to amend his libel claim to add a newspaper editor as an additional defendant, a state court held.<sup>164</sup> The court denied the plaintiff's pro se motion to add a number of defendants who were not related to the case or to unmask confidential sources used by *The New York Daily News* in its news coverage of the underlying criminal case.<sup>165</sup> The issue arose under CPLR 3025(b) relating to leave to amend a complaint.<sup>166</sup>

#### *K. Statute of Limitations/Single Publication Rule*

The one-year statute of limitations, coupled with the single publication rule, barred a reprisal of a defamation suit after a publisher announced the story was included in a digital archive collection, a state court held in *Biro v. Conde Nast*.<sup>167</sup> The latest lawsuit by an art appraiser who was the subject of a *New Yorker* magazine article in July 2010 followed earlier federal litigation that had previously dismissed the case.<sup>168</sup>

The plaintiff hinged its renewed case on an email the publisher sent to subscribers announcing that the article's author David Grann was having a film adapted from one of his books and that the articles he wrote for *The New Yorker* were part of the magazine's digital archives.<sup>169</sup> The article had been part of the digital archives since it was first published in 2010.<sup>170</sup>

The plaintiff had argued that the email and the archival constituted a new publication.<sup>171</sup> The one-year statute of limitations, governed by CPLR 215(3), accrued in 2010 when the article was published.<sup>172</sup> This issue, however, dovetails with the single publication rule, which would determine whether a subsequent publication would constitute a new or second publication, thus triggering a new statute of limitations.<sup>173</sup>

The court laid out conditions when a new publication or

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164. No. 401845/2013, 2018 N.Y. Slip Op. 50435(U), at 1–2, 6 (Sup. Ct. N.Y. Cty. Mar. 28, 2018).

165. *Id.* at 3, 5–6.

166. *Id.* at 1 (citing N.Y. C.P.L.R. 3025(b) (McKinney Supp. 2019)).

167. No. 154663/2017, 2018 N.Y. Slip Op. 31181(U), at \*5 (Sup. Ct. N.Y. Cty. June 7, 2018).

168. *See Biro v. Condé Nast*, 622 F. App'x. 67, 70 (2d Cir. 2015); *see also Biro v. Condé Nast*, 963 F. Supp. 2d 255, 258–59, 288–89 (S.D.N.Y. 2013).

169. *Biro*, 2018 N.Y. Slip Op. 31181(U), at 3.

170. *Id.*

171. *Id.*

172. *Id.* at 4; N.Y. C.P.L.R. 215(3) (McKinney 2003).

173. *Id.* at 4 (quoting *Martin v. Daily News L.P.*, 121 A.D.3d 90, 103, 990 N.Y.S.2d 473, 483 (1st Dep't 2014)).

republishing would trigger a new statute of limitations: (1) when the new publication is intended for and reaches a new audience; (2) the subsequent publication is “distinct” from the original publication; (3) the new content is modified in content, and form; and (4) the defendant is in control of the content and decides to republish.<sup>174</sup>

The court categorized the email announcement as “at most, ‘a delayed circulation of the original [document]’” not a new publication or any justification to overcome the statute of limitations.<sup>175</sup> Thus, the case was properly dismissed.<sup>176</sup>

#### *L. Communications Decency Act § 230*

The Communications Decency Act (CDA) § 230<sup>177</sup> immunized a gay-oriented social media website in a far-reaching tort-based lawsuit by a man who was the subject of a fake online profile, a federal court ruled in *Herrick v. Grindr*.<sup>178</sup> Here, the plaintiff faced an onslaught of unsolicited inquiries, proposals, threats, and harassment after an ex-boyfriend posted on the website a phony profile with his photograph and numerous lies about the plaintiff, his interests, and tastes.<sup>179</sup> The fake profile also urged potential suitors to go to the plaintiff’s home and workplace.<sup>180</sup>

The plaintiff’s lawsuit included fourteen causes of action, including products liability, negligent design, failure to warn, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, fraud, negligent misrepresentation, promissory estoppel, and deceptive practices.<sup>181</sup> The crux of the plaintiff’s argument was that the website was responsible for the offensive, threatening material and could have and should have taken steps to prevent the posting of the fake profile and prevent the resulting harm.<sup>182</sup>

The court granted Grindr’s motion to dismiss under Rule 12(b)(6) for failure to state a claim because it was immune from liability for the

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174. *Biro*, 2018 N.Y. Slip Op. 31181(U), at 4–5 (quoting *Martin*, 121 A.D.3d at 103, 990 N.Y.S. 2d at 483).

175. *Id.* at 5 (quoting *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 435, 420 N.E.2d 377, 382, 438 N.Y.S.2d 496, 501 (1981)).

176. *Id.* at 5–6.

177. *See* 47 U.S.C. § 230 (2012).

178. 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

179. *Id.* at 584–85.

180. *Id.* at 585.

181. *Id.* at 586–87.

182. *Id.*

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content posted by its users under § 230.<sup>183</sup> This section of the CDA indemnifies websites known as interactive computer services from facing tort liability for content posted by its users.<sup>184</sup> Under 47 U.S.C. § 230, three factors are critical to determining immunity: (1) whether the site is an interactive computer service; (2) the claim is based on content generated and provided by a user; and (3) whether the claim would convert the defendant to a publisher or speaker relating to the information posted.<sup>185</sup>

The court found Grindr to be a legitimate interactive computer service.<sup>186</sup> The site's technical design which allowed users to choose options through a "drop-down" menu did not alter that finding.<sup>187</sup> "An ICS is not the creator of offensive content unless it contributes to the 'development of what [makes] the content unlawful,'" the court wrote.<sup>188</sup> The court continued, "[a]n ICS may not be held liable for so-called 'neutral assistance' or tools and functionality that are available equally to bad actors and the app's intended users."<sup>189</sup>

The court also dismissed the copyright infringement claim.<sup>190</sup>

### III. NEWSGATHERING

#### *A. Subpoenas*

In *People v. Juarez*, the Court of Appeals ruled that a *New York Times* reporter should be compelled to testify and turn over notes to prosecutors in a high-profile child murder case.<sup>191</sup> The facts of this case were discussed in greater detail by the First Department.<sup>192</sup>

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183. *Herrick*, 306 F. Supp. 3d at 584, 601; *see also* 47 U.S.C. § 230 (2012).

184. *Id.* at 588 (quoting 47 U.S.C. § 230(c)(1)) ("[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

185. *Id.* (first quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016); and then quoting *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)).

186. *Id.*

187. *Id.* at 589 (first citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); and then citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008)).

188. *Herrick*, 306 F. Supp. 3d at 589 (quoting *LeadClick Media, LLC*, 838 F.3d at 174).

189. *Id.* (quoting *LeadClick Media, LLC*, 838 F.3d at 176) (citing *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1169).

190. *Id.* at 601.

191. 31 N.Y.3d 1186, 1187, 1192–93, 107 N.E.3d 556, 557, 560–61, 82 N.Y.S.3d 336, 337, 340–41 (2018) (Rivera, J., dissenting).

192. *See People v. Juarez*, 143 A.D. 3d 589, 589, 39 N.Y.S.3d 155, 156 (1st Dep't 2016); *see also* Roy S. Gutterman, *Media Law, 2016–17 Survey of New York Law*, 68 SYRACUSE L. REV. 1011, 1025–26 (2018).

New York's highest court reversed the appellate division's ruling that the subpoena should be quashed.<sup>193</sup> The non-party subpoena in a criminal case was not something that could be appealed, the court held.<sup>194</sup>

The timing of the subpoena, following commencement of a criminal case against a defendant, proved critical because of the Criminal Procedure Law's (CPL) prohibition on non-party appeals.<sup>195</sup> In a lengthy footnote, the court wrote:

[T]he critical consideration under the CPL is indeed when the order resolving the motion to quash was issued, i.e. before or after a criminal action has been commenced. This bright-line rule focuses on the filing of the accusatory instrument, a critical milestone that carries with it significant consequences for both parties to the criminal action.<sup>196</sup>

The court explained that the statutory prohibition on appeals is grounded in fairness to attempt to ensure that criminal prosecutions are not delayed or otherwise dragged out through appeals.<sup>197</sup> The reporter's interest, the State's reporter's shield law, as well as the state constitutional rights of the reporter, were not ignored by the court, but were subsumed by the State's interest in a criminal prosecution as well as the CPL's rules.<sup>198</sup>

The court noted it was "not unsympathetic" to the reporter's interests in the case.<sup>199</sup> "However, the right to appeal is not premised on the nature of the challenge waged, and this Court cannot 'create a right to appeal out of thin air.'"<sup>200</sup>

Judge Rivera filed a lengthy and detailed dissent, pointing to New York's reporter's shield law, Civil Rights Law § 79-h (c), which protects reporters from having to disclose unpublished material.<sup>201</sup>

Judge Rivera wrote:

The problem created by the majority's ruling here falls particularly

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193. *Juarez*, 31 N.Y.3d at 1187, 107 N.E.3d at 557, 82 N.Y.S.3d at 337.

194. *Id.*

195. *Id.* at 1190, 107 N.E.3d at 559, 82 N.Y.S.3d at 339 (citing *People v. Santos*, 64 N.Y.2d 702, 704, 474 N.E.2d 1192, 1193, 485 N.Y.S.2d 524, 525 (1984)).

196. *Id.* at 1189, 107 N.E.3d at 558, 82 N.Y.S.3d at 338 n.2.

197. *Id.* (citing N.Y. CRIM. PROC. 30.30(4)(a) (McKinney 2018)).

198. *See Juarez*, 31 N.Y.3d at 1191, 107 N.E.3d at 559, 82 N.Y.S.3d at 339 (quoting *People v. Laing*, 79 N.Y.2d 166, 172, 589 N.E.2d 372, 375, 581 N.Y.S.2d 149, 152 (1992)) (first citing *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529, 523 N.E.2d 277, 281, 528 N.Y.S.2d 1, 5 (1988); and then citing N.Y. CONST. art. 1, § 8)).

199. *Id.*

200. *Id.* at 1191, 107 N.E.3d at 559–60, 82 N.Y.S.3d at 339–40 (quoting *Laing*, 79 N.Y.2d at 172, 589 N.E.2d at 375, 581 N.Y.S.2d at 152).

201. *Id.* at 1192, 107 N.E.3d at 560, 82 N.Y.S.3d at 340 (Rivera, J., dissenting) (quoting N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 2009)).



harshly on journalists like [Frances] Robles, whose reputation depends on maintaining confidences in newsgathering. A non-party journalist is irrevocably aggrieved by the denial of a motion to quash a subpoena, and is forced either to comply with the order and jeopardize the journalist's reputation or to refuse and risk being held in contempt. Those outcomes are completely avoidable by adhering to this Court's traditional treatment of motions to quash as civil in nature, and an order denying the motion as final and appealable.<sup>202</sup>

### *B. Shield Law*

A subscription-based business information service qualified as a news entity under New York's Shield Law, the appellate division held, thwarting a business' pre-action discovery efforts to unmask a confidential source in the case of *In re Murray Energy Corp.*<sup>203</sup> The petitioner, an energy and coal company, sought to uncover the source and potential leak of supposedly confidential information published by the respondent.<sup>204</sup> The lower court granted the request, but the appellate division overturned in a unanimous decision.<sup>205</sup>

The respondent, Reorg Research, publishes a subscription-based news service focusing on debt-distressed companies, which the court believed provided important and newsworthy information to the public.<sup>206</sup> The court found a bona fide newsgathering and distribution function even though the "narrow," "niche" subscription service cost between \$30,000 and \$120,000 with 375 subscribers and 9,000 authorized users.<sup>207</sup>

"[T]he public benefits secondarily from the information that respondent provides to its limited audience, because that audience is comprised of the people who are most interested in this information and most able to use it and benefit from it."<sup>208</sup> The implication that the petitioner was dragging the publisher into court to determine the identity of its sources could create a "chilling effect" on its journalistic function.<sup>209</sup>

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202. *Id.* at 1198, 107 N.E.3d at 565, 82 N.Y.S.3d at 345.

203. 152 A.D.3d 445, 446, 58 N.Y.S.3d 369, 370 (1st Dep't 2017) (quoting CIV. RIGHTS § 79-h(a)(6), (b)-(c)).

204. *Murry Energy Corp.*, 152 A.D.3d at 446, 58 N.Y.S.3d at 370 (citing N.Y. C.P.L.R. 3102(c) (McKinney 2018)).

205. *Id.* at 445-46, 58 N.Y.S.3d at 370; *see also* *Murray Energy Corp. v. Reorg Research, Inc.*, 55 Misc. 3d 669, 683, 47 N.Y.S.3d 871, 881 (Sup. Ct. N.Y. Cty. 2017).

206. *Id.* at 446, 58 N.Y.S.3d at 370 (citing CIV. RIGHTS § 79-h(c), (b), (a)(6)).

207. *Id.* at 446, 58 N.Y.S.3d at 371.

208. *Id.* at 446-47, 58 N.Y.S.3d at 371.

209. *Murray Energy Corp.* 152 A.D.3d at 447, 58 N.Y.S.3d at 371-72.

This newsgathering and dissemination function should avail Reorg to the benefits afforded other news outlets when applying New York’s reporter’s Shield Law, Civil Rights Law § 79-h, which immunizes journalists from disclosing the identities of confidential sources in judicial proceedings, including pre-action discovery actions, the court held.<sup>210</sup>

The court forcefully wrote:

Extending protection to respondent under the Shield Law is consistent with New York’s ‘long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press’—protection that has been recognized as ‘the strongest in the nation.’ To condition coverage on a fact-intensive inquiry analyzing a publication’s number of subscribers, subscription fees, and the extent to which it allows further dissemination of information is unworkable and would create substantial prospective uncertainty, leading to a potential ‘chilling’ effect.<sup>211</sup>

### C. FOIL

The New York City Police Department could deny a Freedom of Information Law request without confirming or denying whether the documents existed in the first place, the Court of Appeals ruled in *Abdur-Rashid v. New York City Police Department*.<sup>212</sup> The case involved two requests by New Yorkers who sought documents relating to the police department’s possible surveillance and investigation of New York City mosques and several Muslim individuals.<sup>213</sup> The police department denied the requests, prompting an Article 78 hearing and subsequent appeals.<sup>214</sup>

Though the parties were citizens—not members of the media—both media rights and civil rights organizations took an active interest in the case.<sup>215</sup> The case challenged the way government entities may legally withhold public records under the Freedom of Information Law (FOIL) in matters of ongoing police investigations.<sup>216</sup> The Court of Appeals

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210. *Id.* at 446, 58 N.Y.S.3d at 370 (citing N.Y. CIV. RIGHTS LAW § 79-h).

211. *Id.* at 447, 58 N.Y.S.3d at 371–72 (quoting *Holmes v. Winter*, 22 N.Y.3d 300, 307, 310, 3 N.E.3d 694, 698, 700, 980 N.Y.S.2d 357, 361, 363 (2013)).

212. 31 N.Y.3d 217, 239, 100 N.E.3d 799, 813, 76 N.Y.S.3d 460, 474 (2018).

213. *Id.* at 223, 100 N.E.3d at 801, 76 N.Y.S.3d at 462.

214. *See id.* at 223–24, 100 N.E.3d at 801–02, 76 N.Y.S.3d at 462–63.

215. The Reporters Committee for Freedom of the Press submitted an amicus brief supporting the petitioner in the case. The Tully Center for Free Speech was one of more than two dozen organizations arguing for openness with the release of government information.

216. *See Abdur-Rashid*, 31 N.Y.3d at 239, 100 N.E.3d at 813, 76 N.Y.S.3d at 474; *see also* N.Y. PUB. OFF. LAW § 87 (McKinney Supp. 2019).

acknowledged being guided and persuaded by the federal Freedom of Information Act, known as FOIA, and cases interpreting the law.<sup>217</sup>

The court specifically adopted what in federal FOIA cases has been called a “Glomar” denial which emanates from a federal circuit decision in *Phillippi v. Central Intelligence Agency*, where a reporter’s FOIA request for documents relating to a CIA investigation was neither confirmed nor denied.<sup>218</sup> The agency had argued that even acknowledging existence of documents would jeopardize government operations, which in that case involved a ship, the Hughes Glomar Explorer, which may have been involved in the search for sunken Russian submarines during the height of the Cold War.<sup>219</sup> Hence, an agency’s denial on these terms has subsequently been referred to as a Glomar denial.<sup>220</sup> The Second Circuit has followed Glomar, the court noted.<sup>221</sup>

While most Glomar denials involve national security or counterintelligence matters because of the sensitive nature of pending law enforcement investigations, the Court of Appeals accepted the government’s arguments.<sup>222</sup> The court wrote: “[W]hen there is a FOIL request as to whether a specific individual or organization is being investigated or surveilled, the agency—in order to avoid ‘tipping its hand’—must be permitted to provide a Glomar-type response.”<sup>223</sup>

The lengthy opinion attempted to balance the legislative purpose behind FOIL, which fosters open and transparent government operations as well as public scrutiny of those operations.<sup>224</sup> The court went as far as crediting FOIL as an “important” but not the only “tool” in fostering government openness.<sup>225</sup> The court also noted that the statute offers a

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217. *Id.* at 231, 100 N.E.3d at 807, 76 N.Y.S.3d at 468 n.4 (explaining how the court was influenced by federal law, but did not engage in “blind adoption” of federal standards).

218. *Id.* at 228, 100 N.E.3d at 805, 76 N.Y.S.3d at 466; *see* 546 F.2d 1009, 1012 (D.C. Cir. 1976).

219. *Id.* (citing 5 U.S.C. § 552(b)(3) (2012)).

220. *Id.* (citing *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 64 (2d Cir. 2009)) (noting that the Second Circuit has been following the Glomar exception).

221. *Abdur-Rashid*, 31 N.Y.3d at 228, 100 N.E.3d at 805, 76 N.Y.S.3d at 466.

222. *Id.* at 231, 100 N.E.3d at 807, 76 N.Y.S.3d at 468.

223. *Id.*

224. *Id.* at 239, 100 N.E.3d at 813, 76 N.Y.S.3d at 474. The court wrote:

To promote open government and public accountability, FOIL imposes a broad duty on government agencies to make their records available to the public. The statute is based on a policy that “the public is vested with an inherent right to know and that secrecy is anathematic to our form of government.” *Id.* at 224–25 (quoting *Fink v. Lefkowitz*, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465, 419 N.Y.S.2d 467, 470 (1979) (citing N.Y. PUB. OFF. LAW § 84 (McKinney 2008))).

range of narrowly-interpreted exceptions, which would allow the government to withhold documents and information, including the pending law enforcement investigation proceeding.<sup>226</sup>

The court wrote:

This Court has never held that FOIL compels a law enforcement agency to reveal records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else—and the structure and purpose of the law enforcement and public safety exemption in Public Officers Law § 87 are rendered meaningless by a contrary conclusion.<sup>227</sup>

#### IV. INVASION OF PRIVACY

Even though an avatar may have the ability to violate a celebrity's privacy rights, an image used in a popular video game did not rise to an invasion of privacy, the Court of Appeals held in *Lohan v. Take-Two Interactive Software, Inc.*<sup>228</sup> There, the State's high court ruled that the digital image of a woman in an iteration of the popular interactive video game *Grand Theft Auto V* was not based on or even similar to images of the actress, Lindsay Lohan.<sup>229</sup>

The court's opinion focused on two issues: (1) whether an avatar or a "graphical representation" of a person could constitute an invasion of privacy under Civil Rights Law §§ 50–51, and (2) whether the image used in the video game was a recognizable replication of the plaintiff's likeness.<sup>230</sup>

New York's conception of invasion of privacy, both under the statute and common law, applies a narrow and strict definition requiring a commercial or advertising use of an image without the plaintiff's consent.<sup>231</sup> A violation of § 50 carries a misdemeanor penalty but could

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225. *Id.* (offering additional mechanisms for holding the government accountable, such as post-use notice once investigations are completed or constitution-based litigation based on government overreach).

226. *Abdur-Rashid*, 31 N.Y.3d at 225–26, 100 N.E.3d at 803, 76 N.Y.S.3d at 464 (citing N.Y. PUB. OFF. LAW § 87(2)(e)(i), (iv), (f) (McKinney Supp. 2019) ("For example, the law enforcement exemption . . . which the NYPD relied on here, protect records that if disclosed, would interfere with law enforcement investigations or judicial proceedings, reveal nonroutine criminal investigative techniques or endanger the life or safety of any person.")).

227. *Id.* at 227, 100 N.E.3d at 805–06, 76 N.Y.S.3d at 466–67; *see* PUB. OFF. § 87.

228. 31 N.Y.3d 111, 117, 97 N.E.3d 389, 391, 73 N.Y.S.3d 780, 782 (2018) (citing N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009)).

229. *Id.* at 117, 122–23, 97 N.E.3d at 391, 395, 73 N.Y.S.3d at 782, 786.

230. *Id.* at 117, 97 N.E.3d at 391, 73 N.Y.S.3d at 782.

231. *Id.* at 119–120, 97 N.E.3d at 393, 73 N.Y.S.3d at 784; (first citing *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 439, 434 N.E.2d 1319, 1321, 449 N.Y.S.2d 941, 943 (1982); and then citing CIV. RIGHTS §§ 50–51).

also trigger a civil lawsuit under the auspices of invasion of privacy.<sup>232</sup> The use could be a “name, portrait, picture or voice” but it must be for “advertising purposes.”<sup>233</sup> The court characterizes the statute’s parameters as “narrowly” drafted in order to have flexibility for journalists, newsgatherers and satirists.<sup>234</sup>

“Applying the settled rules applicable to this motion to dismiss, we conclude that the amended complaint was properly dismissed because the artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman that are not reasonably identifiable as plaintiff,” the court wrote.<sup>235</sup>

With the origins of New York’s privacy law dating back to a now-famous 1902 case involving a flour box company’s unconsented use of a young girl’s photographic image on its boxes in *Roberson v. Rochester Folding Box Co.*,<sup>236</sup> the court in *Lohan* brings the commercial appropriation issue to modern twenty-first century technology.<sup>237</sup> Specifically, the court wrote, “[i]n view of the proliferation of information technology and digital communication, we conclude that a graphical representation in a video game or like media may constitute a ‘portrait’ within the meaning of the Civil Rights Law.”<sup>238</sup>

Applying the standards to Lohan’s complaint, the court ruled that even though a factfinder could make a determination if a use would violate the statute, it may also be a matter of law.<sup>239</sup>

Those artistic renderings are indistinct, satirical representations of the style, look, and persona of a modern, beach-going young woman. It is undisputed that defendants did not refer to plaintiff in GTAV, did not

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232. *Id.* (quoting *Arrington*, 55 N.Y.2d at 438, N.E.2d at 1320, 449 N.Y.S.2d at 942 n.1) (citing CIV. RIGHTS §§ 50–51).

233. *Lohan*, 31 N.Y.3d at 119, 97 N.E.3d at 393, 73 N.Y.S.3d at 784 (quoting CIV. RIGHTS § 51).

234. *Id.* at 120, 97 N.E.3d at 393–94, 73 N.Y.S.3d at 784–85 (first quoting *Arrington*, 55 N.Y.2d at 439, N.E.2d at 1321, 449 N.Y.S.2d at 943; and then quoting *Ann-Margret v. High Socy. Mag., Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980)) (first citing *Hampton v. Guare*, 195 A.D.2d 366, 366, 600 N.Y.S.2d 57, 58 (1st Dep’t 1993); then citing *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 22 A.D.2d 452, 458, 256 N.Y.S.2d 301, 307 (1st Dep’t 1965); and then citing *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 123, 612 N.E.2d 699, 703, 596 N.Y.S.2d 350, 354 (1993)).

235. *Id.* at 121, 97 N.E.3d at 394, 73 N.Y.S.3d at 785 (first citing *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 638 N.E.2d 511, 513, 614 N.Y.S.2d 972, 974 (1994); and then citing *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 384, 472 N.E.2d 307, 309, 482 N.Y.S.2d 457, 459 (1984)).

236. *See* 171 N.Y. 538, 542, 64 N.E. 442, 442 (1902).

237. *See* 31 N.Y.3d at 122, N.E.3d at 395, 73 N.Y.S.3d at 786.

238. *Id.*

239. *See id.*

use her name in GTAV, and did not use a photograph of her in that game. Moreover, the ambiguous representations in question are nothing more than cultural comment that is not recognizable as plaintiff and therefore is not actionable under Civil Rights Law article 5.<sup>240</sup>

In a terse, three-paragraph ruling, the high court affirmed dismissal of a second commercial appropriation case involving Take-Two, in *Gravano v. Take-Two Interactive Software, Inc.*<sup>241</sup>

## V. OTHER ISSUES

### A. Other Torts

The addition of a claim for tortious interference, appended to a defamation lawsuit, was properly dismissed along with the defamation claim in a case involving a website that tracks medical fraud, the Second Circuit held in *Goldman v. Barrett*.<sup>242</sup> The defendant website, *Quackwatch*, reported a story about the plaintiffs, two anti-aging doctors who were investigated for questionable medical techniques and participated in a settlement agreement with medical regulators in Illinois.<sup>243</sup>

The plaintiffs argued that in addition to defaming them, the article interfered with prospective business clients in China and Malaysia.<sup>244</sup> The tort of defamation is intended to protect a plaintiff's reputation through civil means.<sup>245</sup> The court held the tortious interference claim to be "duplicative" because it stems from the same content and allegations contained in the defamation claim, and should be barred.<sup>246</sup> Further, even

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240. *Id.* at 123, 97 N.E.3d at 395, 73 N.Y.S.3d at 786 (first citing *Gravano v. Take-Two Interactive Software, Inc.*, 142 A.D.3d 776, 776–77, 37 N.Y.S.3d 20, 21–22 (1st Dep't 2016); and then citing *Cohen*, 63 N.Y.2d at 384, 472 N.E.2d at 309, 482 N.Y.S.2d at 459).

241. *See* 31 N.Y.3d 988, 990, 97 N.E.3d 396, 396, 73 N.Y.S.3d 787, 787 (2018). The appellate division discussed the facts of this case, detailing the insufficient claim by the plaintiff who said she had been depicted in the video game *Grand Theft Auto* without her consent. However, the court disagreed with the plaintiff's characterization. *See* 142 A.D.3d at 778, 37 N.Y.S.3d at 22 (1st Dep't 2016) (citing *Costanza v. Seinfeld*, 279 A.D.2d 255, 255, 719 N.Y.S.2d 29, 30–31 (1st Dep't 2001)).

242. 733 F. App'x 568, 569, 571 (2d Cir. 2018) (citing *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400–01 (2d Cir. 2006)).

243. *Id.* at 569.

244. *Id.*

245. *Id.* at 570 (first citing *Jain v. Sec. Indus. & Fin. Mkts Ass'n*, No. 08 Civ. 6463 (DAB), 2009 U.S. Dist. LEXIS 91206, at \*23 (S.D.N.Y. Sept. 28, 2009); and then citing *Goldberg v. Sitomer, Sitomer & Porges*, 63 N.Y.2d 831, 833, 472 N.E.2d 44, 482 N.Y.S.2d 268 (1984)).

246. *Id.* at 571 (citing *Noel v. Interboro Mut. Indem. Ins. Co.*, 31 A.D.2d 54, 55–56, 295 N.Y.S.2d 399, 400 (1st Dep't 1968)).

as a stand-alone claim, they would have been dismissed.<sup>247</sup>

The court wrote: “New York courts treat harm stemming from injury to reputation as sounding in defamation, and do not recognize separate torts as additional causes of action.”<sup>248</sup>

### *B. Contracts*

A federal court rejected a lawyer’s defamation, breach of implied covenant, intentional misrepresentation, and fraudulent inducement lawsuit against a television network and producers of a reality television show featuring the plaintiff.<sup>249</sup> The plaintiff argued that she was disparaged and defamed in her depiction on the reality television show *Money, Power, Respect*.<sup>250</sup>

The court, however, dismissed the claims because the plaintiff had signed a valid and extensive release/participation agreement.<sup>251</sup> Applying New York contract law, the court upheld the release because there was no evidence that it was established by “duress, illegality, fraud or mutual mistake.”<sup>252</sup> Additionally, the agreement included a “broad release and covenant not to sue.”<sup>253</sup>

Speaking to the nature of unscripted reality television, the court also pointed to release clauses addressing unknown or unspecified issues that may arise out of the publication or broadcast.<sup>254</sup>

“The ‘clear, broad and dispositive’ language used in the release agreed to by Plaintiff bars Plaintiff from asserting any claims related to her participation in the Program, including those involving fraud,” the court wrote.<sup>255</sup>

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247. *Goldman*, 733 F. App’x at 571.

248. *Id.* at 570–71 (first citing *Morrison v. Nat’l Broad. Co.*, 19 N.Y.2d 453, 458, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 644 (1967); then citing *Krepps v. Reiner*, 588 F. Supp. 2d 471, 485 (S.D.N.Y. 2008); and then citing *Pasqualini v. MortgageIT, Inc.*, 498 F. Supp. 2d 659, 669–70 (S.D.N.Y. 2007)).

249. *Shapiro v. NFGTV, Inc.*, No. 16 Civ. 9152 (PGG), 2018 U.S. Dist. LEXIS 22879, at \*1–2 (S.D.N.Y. 2018).

250. *Id.*

251. *Id.* at \*24.

252. *Id.* at \*15–16 (internal quotations omitted) (quoting *Centro Empresarial Cempresa S.A. v. América Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276, 952 N.E.2d 995, 1000, 929 N.Y.S.2d 3, 8 (2011)).

253. *Id.* at \*17.

254. *Shapiro*, 2018 U.S. Dist. LEXIS 22879, at \*19.

255. *Id.* at \*20 (first citing *Bihag v. A&E TV Networks, LLC*, 669 F. App’x 17, 18 (2d Cir. 2016); then citing *Usach v. Tikhman*, No. 11 Civ. 954 (DLC), 2011 U.S. Dist. LEXIS 141155, at \*18 (S.D.N.Y. 2011); then citing *Consorcio Propipe, S.A. de C.V. v. Vinci, S.A.*, 544 F. Supp. 2d 178, 191–92 (S.D.N.Y. 2008); and then citing *Centro Emnresarial*, 17 N.Y.3d at 277).

## VI. INTELLECTUAL PROPERTY

*A. Copyright*

A photo that went viral and was reposted and embedded by several media outlets, was protected under copyright law, and the embedding could constitute an infringing display, a federal court held in *Goldman v. Breitbart News Network, LLC*.<sup>256</sup> Though not the Southern District's first foray into the question of the copyright implications of embedded content, the decision plows new ground in the district by interpreting two significant modern copyright cases.<sup>257</sup>

The court's introduction to the case set the tone for the opinion,

When the Copyright Act was amended in 1976, the words "tweet," "viral," and "embed" invoked thoughts of a bird, a disease, and a reporter. Decades later, these same terms have taken on new meanings as the centerpieces of an interconnected world wide web in which images are shared with dizzying speed over the course of any given news day.<sup>258</sup>

In this case, the plaintiff had taken a photograph of professional athletes, including NFL star Tom Brady, walking on a street.<sup>259</sup> He uploaded his photographs to the social media platform, Snapchat Story.<sup>260</sup> Practically instantaneously, the photo went viral and was reposted and embedded by several defendant news outlets, including *Breitbart News, Time, Inc., Yahoo, Vox, Gannett, Boston Globe Media, and New England Sports Network*.<sup>261</sup>

In the arguments for summary judgment, the defendants argued that liability for infringement for displaying the photo should be limited because they did not physically possess the images which were housed on a different server.<sup>262</sup> The court did not incorporate the so-called "server test."<sup>263</sup>

Thus, the re-tweeting and embedding constituted a display under the

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256. 302 F. Supp. 3d 585, 585–86, 594 (S.D.N.Y. 2018).

257. *See id.* at 594–96. *See generally* *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014) (holding that a streaming service violated petitioners' copyrighted works publicly when it streamed the works to subscribers); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F. 3d 1146 (9th Cir. 2007) (holding that a search engine operator that displayed thumbnail versions of the copyright holder's images did not distribute copies of the photos and therefore were not liable for infringement).

258. *Id.* at 585–86.

259. *Id.* at 586.

260. *Id.*

261. *Goldman*, 302 F. Supp. 3d at 586–87.

262. *Id.* at 592–93.

263. *Id.*



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copyright act.<sup>264</sup>

The court wrote:

It is clear, therefore, that each and every defendant itself took active steps to put a process in place that resulted in a transmission of the photos so that they could be visibly shown. Most directly this was accomplished by the act of including the code in the overall design of their webpage; that is, embedding. Properly understood, the steps necessary to embed a Tweet are accomplished by the defendant website; these steps constitute a process. The plain language of the Copyright Act calls for no more.<sup>265</sup>

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264. *Id.* at 593.

265. *Id.* at 594.